ORIGINAL (3)

Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

RECEIVED
MAY 5 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 94-8729

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

TIMOTHY A. BAUGHMAN*
Chief of Research,
Training, and Appeals
Wayne County Prosecutor's Office
1441 St. Antoine
Detroit, Michigan 48226
(313) 224-5792

Counsel for Respondent*

QUESTIONS PRESENTED

1. Whether a Michigan nuisance abatement statute, which includes in its parts specific language that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them is not required" before abatement may be ordered, violates the Due Process Clause of the Fourteenth Amendment and/or the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment): and;

2. Whether the application of that statute to a wife co-owner of an automobile, which resulted in the state court exercising discretion and abating the nuisance (ordering the vehicle sold), violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (as applied to the states by the Fourteenth Amendment), where the abatement of the nuisance (the vehicle) resulted from the state court finding that the husband co-owner had used the vehicle to engage in fellatio with a known prostitute, in an area where prostitution was extant, the wife co-owner stated she had no knowledge of that nuisance conduct, and the record established the husband had been observed approaching known prostitutes prior to the specific incident at issue.

LIST OF PARTIES

1. State of Michigan ex rel. Wayne County Prosecutor (Plaintiff below and respondent in the U.S. Supreme Court)

2. John Charles Bennis (Defendant below; not joining in this petition for certiorari)

3. Tina B. Bennis (Defendant below and petitioner in the U.S. Supreme Court)

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF PARTIES ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
LACK OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS CLAIMED 2
STATEMENT OF THE CASE 3
BASIS FOR DENIAL OF U.S. SUPREME COURT JURISDICTION 5
STATEMENT OF FACTS AND THE PROCEEDINGS BELOW 6
REASONS FOR DENIAL OF CERTIORARI 7
CONCLUSION 11

INDEX OF AUTHORITIES

Cases PAGE

Attorney General v Robinson,
250 Mich 99; 299 NW2d 403 (1930)..... 8

Berea College v Kent,
211 US 45, 53; 29 SCt 33; 53 LEd 81 (1908).....5

Calero-Toledo v Pearson Yacht Leasing Co.,
416 US 663; 94 SCt 2080; 40 LEd2d 452 (1974).....10

Michigan v Long,
463 US 1032; 103 SCt 469; 77 LEd2d 1201 (1983).....5

People v Schoonmaker,
241 Mich 177; 216 NW2d 456 (1927).....6

State v Bennis,
200 Mich App 670; 504 NW2d 731 (1993).....1

State v Bennis,
447 Mich 719; --- NW2d --- (1994).....PASSIM

State v Motorama Motel,
105 Mich App 224; 307 NW2d 349 (1981).....7

Van Oster v Kansas,
282 US 465, 467; 47 SCt 133; 71 LEd2d 356 (1926).....9

STATUTES

MCL 600.3801; MSA 27A.3801.....3,5

MCL 600.3815(2); MSA 27A.3815(2).....3,7

MCL 750.338b; MSA 28.570(2).....5

OTHER AUTHORITIES

Fifth Amendment, U.S. Constitution.....ii, 2, 8

Fourteenth Amendment, U.S. Constitution.....ii, 2, 8

28 USC 1257.....2

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

---

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

The respondent, Wayne County Prosecutor's Office, by Timothy A. Baughman, Chief of Research, Training, and Appeals, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Michigan Supreme Court decision in this case, reported at 447 Mich 719, -- NW2d -- (1994).

OPINIONS BELOW

The Michigan Supreme Court opinion is at 447 Mich 719 (1994), and the Michigan Court of Appeals decision is at 200 Mich App 670; 504 NW2d 731 (1993). The trial court gave its findings of fact from the bench, followed by a judgment, which was part of the state appellate record.

JURISDICTION

The Michigan Supreme Court issued its decision on December 30, 1994, with an order of that Court entered January 23, 1995, by the clerk of the Michigan Supreme Court.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1257. Respondent states that an adequate and independent state ground exists (as seen in the Michigan Supreme Court opinion) to sustain the decision, notwithstanding the state high court having considered the constitutional claim made.

CONSTITUTIONAL PROVISIONS CLAIMED

Petitioner claims that the Fourteenth Amendment of the U.S. Constitution and the Takings Clause of the Fifth Amendment are violated by the Michigan Supreme Court decision.

STATEMENT OF THE CASE

This nuisance abatement matter, invoking the State of Michigan's legislative enactments dealing with nuisance abatement, involved (for purposes of this Petition) a claim by the wife co-owner of a vehicle used in nuisance conduct by her husband that, notwithstanding the explicit state law language obviating the need for plaintiff to show knowledge on the part of a defendant in a nuisance abatement action, her interest in the target vehicle could not be abated consistent with due process of law. After making findings of fact, the state trial court exercised the discretion allowed and fashioned a remedy for the nuisance found: abatement (sale) of the vehicle.

A 1977 Pontiac, owned jointly by John and Tina Bennis, was seized by Detroit police, in an area where prostitution was (at that time) rampant, after the police saw John Bennis pick up

a known prostitute, drive around the corner, and engage in fellatio with her in a residential area. Seizure of the car and abatement proceedings were brought pursuant to MCL 600.3801 et seq.; MSA 27A.3801 et seq.; Michigan's nuisance abatement laws, which, in plain language, state (paraphrased) that a vehicle used for purposes of lewdness, assignation or prostitution is a nuisance and may be abated.

The state statute had been applied to automobiles in prohibition cases, and to buildings where gambling, illegal liquor sales, and prostitution had occurred. In one matter, a room in a hotel was ordered abated (padlocked) based on evidence of one use of the room for prostitution, with no indication that the owner of the hotel had knowledge.

Language of the state statute indicates that "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required". MCL 600.3815 (2); MSA 27A.3815 (2). Unlike many drug forfeiture statutes, Michigan's included, there is no exemption for "innocent owners" from application of the law.

The Michigan Court of Appeals, in a 2-1 opinion, held that 1) all owners of the vehicle sought to be abated must have knowledge of the existence of the nuisance, 2) a single incident of lewdness, assignation, or prostitution involving a vehicle was insufficient to create a nuisance, and 3) abatement of a

vehicle requires proof that the sexual conduct complained of was performed in exchange for money. Plaintiff below appealed to the Michigan Supreme Court.

In a plurality opinion, the Michigan Supreme Court, 447 Mich 719 (1994), held that the Court of Appeals decision was incorrect: 1) the statutory language does not require proof of knowledge on the part of a defendant, 2) a single incident of lewdness, assignation, or prostitution is sufficient to abate a vehicle, and 3) the evidence presented at trial allowed an inference that money was exchanged for the sex act or would be, or that the act itself was lewdness.

As for the claim by Tina Bennis that her interest in the vehicle could not be forfeited, and was done unconstitutionally, the Michigan high court, at pages 739-743, considered the "constitutional significance of the abatement of Mrs. Bennis' interest in the vehicle". (State v Bennis, 447 Mich App 719, 739-740 (1994)). After review of controlling cases, the Supreme Court found no constitutional violation and repeated that the Michigan statute obviates the need for proof of knowledge of a defendant, concluding that the trial court did not abuse his discretion in fashioning an appropriate remedy. (Bennis, supra, p. 743).

Because the Michigan high court, after addressing the constitutional claim by Tina Bennis, found an adequate and independent state ground for its decision, the United States

Supreme Court has no basis for jurisdiction. State law and interpretation in Michigan provide for exactly the procedure which occurred in regard to Tina Bennis' interest in the vehicle seized, ordered abated, and sold. Contrary to matters involving statutory language exempting innocent owners, Michigan's nuisance abatement statutes may abate the interest of an innocent owner.

BASIS FOR DENIAL OF U.S. SUPREME COURT JURISDICTION

The Michigan Supreme Court's decision evidences an adequate and independent state ground for its holding, which was formulated after consideration of the constitutional claim made. This Court should conclude that the state ground in this matter is both independent and adequate to support the judgment. Berea College v Kentucky, 211 US 45, 53; 29 SCt 33, 53 LEd 81 (1908); Michigan v Long, 463 US 1032, 103 SCt 3469, 77 LEd2d 1201 (1983).

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Initially, respondent objects to the first paragraph of petitioner's Statement of Facts since it contains matters not in the lower court record (the state trial court).

For purposes of efficiency and brevity, respondent relies upon the statement of facts given in the Michigan Supreme Court opinion at 447 Mich 719, 723-724, the first three paragraphs of which follow verbatim:

> John Bennis was arrested for gross indecency on the evening of October 3, 1988. On that evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging" passing vehicles on the corner of Eight Mile and Sheffield. The woman was later identified as Kathy Polarchio. The officers next observed a 1977 Pontiac, driven by a man, later identified as John Bennis, turn onto Sheffield and stop near Ms. Polarchio, who approached and entered the passenger side of the Pontiac. The officers followed the Bennis vehicle, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac. The officers immediately approached the Bennis vehicle, shined a flashlight into the front seat, and witnessed Ms. Polarchio performing an act of fellatio on Mr. Bennis.
>
> Mr. Bennis was convicted of gross indecency in violation of MCL 750.338b; MSA 28.570(2). The Wayne County prosecutor then filed a complaint alleging that the Bennis vehicle was a public nuisance subject to abatement pursuant to MCL 600.3801; MSA 27A.3801. The vehicle was co-owned by Mr. Bennis' wife, Tina Bennis, who claimed that she had no knowledge that her husband ever used their vehicle in violation of the statute. The trial judge held that the vehicle was a nuisance and abated the interest of defendant and his wife.
>
> The Court of Appeals reversed the decision of the trial court, holding that the prosecution had an obligation under People v Schoonmaker, 241 Mich 177; 216 NW2d 456 (1927), to demonstrate that Mr. Bennis' wife knew that he used the vehicle in a manner proscribed by the statute and failed to offer such proof. The Court of Appeals next held that under State ex rel Oakland Co Prosecutor v Motorama Motel Corp, 105 Mich App 224; 307 NW2d 349 (1981), proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance. Finally, the Court of Appeals held that the prosecution failed to demonstrate that an act of lewdness, assignation, or prostitution occurred.

The Michigan Supreme Court also mentioned the following relevant facts, at p. 728 of 447 Mich.: One witness, Sammie Parham, a security guard at a business located at Six Mile and Woodward, testified that he had seen Mr. Bennis in the area during the summer before Bennis' October 3, 1988, arrest. Mr. Parham saw Mr. Bennis talking to a prostitute on two separate occasions and ushered the prostitutes away in both instances just as they were about to enter the Bennis vehicle.

REASONS FOR DENIAL OF CERTIORARI

A. The clear language of the state nuisance abatement statute addresses the concept of an innocent owner in a nuisance context, and requires no need for knowledge to be shown on the part of the defendant, nor does it exempt innocent owners from abatement of their property

Michigan's nuisance abatement statute, in MCL 600.3815(2); MSA 27A.3815(2) states: Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required. That has been interpreted through appellate cases to allow for abatement of property even though the owner claimed innocence as to the existence of the nuisance. See, for example, Attorney General v Robinson, 250 Mich 99; 229 NW 403 (1930), where one apartment in a fifty-unit building was abated when proof of a single incident of prostitution was submitted. At page 103 of 250 Mich, the Michigan Supreme Court, after reiterating that the statute did not require knowledge on the part of the owner of the building to be shown, held that the evidence showed one apartment had been used for prohibited nuisance conduct, and could be abated. The Robinson case was relied upon the Michigan Supreme Court in this cause. (See State v Bennis, 447 Mich 735-736.)

So, too, may a vehicle owned by more than one individual be abated where the evidence shows it to have been used in nuisance conduct. The state statute, applied consistent with the manifest language of its parts, does not violate any federal constitutional provisions governing due process or unfair "takings". Since there is no specific statutory exemption for "innocent owners" as is found in many narcotic forfeiture provisions, this Court is not faced with the dilemma presented by those matters: loss of property with no knowledge on the part of the owner. Michigan's nuisance abatement statute

makes it clear: innocence, although it may be argued in trial or any hearing, does not excuse possible abatement of the offending property.

B. The Michigan Supreme Court considered the constitutional claim of petitioner, and concluded the abatement, consistent with federal and state cases, was not constitutionally infirm

In rejecting petitioner Tina Bennis' constitutional claim as to the taking of her interest in the nuisance vehicle, the Michigan high court looked at Van Oster v Kansas, 272 US 465, 467; 47 SCt 133; 71 LEd 354 (1926). In Van Oster, a state statute, similar to Michigan's nuisance abatement law, authorized the forfeiture of the interest of an innocent owner or lienor in property entrusted to another who used the property to transport intoxicating liquor (a nuisance condition under the law).

This Court held in Van Oster that it was not questioned that a state in the exercise of its police powers might forfeit property used by its owner in violation of state laws prohibiting liquor traffic. (Van Oster, supra, 272 US at 358). Then, the Court repeated that it was a settled concept that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the U.S. is not a violation of the due process

clause of the Fifth Amendment. (Van Oster, ibid) The matter was concluded when the Court stated they did not "perceive any valid distinction between the application of the 14th Amendment to the exercise of the police power of a state in this particular field and the application of the 5th Amendment to the similar exercise of the taxing power by the Federal government...". (Van Oster, ibid).

Next, the Michigan Supreme Court looked at Calero-Toledo v Pearson Yacht Leasing Co., 416 US 663, 683; 94 SCt 2080; 40 LEd 2d 452 (1974) regarding the concept of the innocence of the owner of forfeited property. The court concluded that the claim of Tina Bennis was without constitutional consequence in light of Calero-Toledo and Van Oster. (State v Bennis, 447 Mich at 741).

Michigan law on the issue was next considered, and the court held that there was no constitutional violation which resulted from abatement of Tina Bennis' interest in the vehicle. There was an independent and adequate state ground espoused, after consideration of federal precedents.

CONCLUSION

For all of the foregoing reasons, Tina Bennis' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

Dated: May 2, 1995
TAB/LR/jh

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO. 94-08729

TINA B. BENNIS,

Petitioner,

vs.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of RESPONDENT'S BRIEF IN OPPOSITION

upon: Stefan B. Herpel

the within named attorney for Petitioner, by / / PERSONAL SERVICE or /X/ DEPOSITING SAID PLEADING(S) IN THE U.S. MAIL IN THE CITY OF DETROIT enclosed in an envelope bearing postage fully prepaid, on May 3, 1995 plainly addressed as follows:

Stefan B. Herpel
Attorney at Law
206 S. Fifth Ave., Ste. 200
Ann Arbor, MI 48104

Louis J. Caruso
Solicitor General
761 Law Building
525 W. Ottawa
Lansing, MI 48902

JOYCELYN HAMMONS

And said pleading was filed in the Supreme Court of the United States by DEPOSITING IN THE U.S. MAIL on May 3, 1995 addressed as follows:

JOSEPH F. SPANIOL, JR., CLERK
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Timothy A. Baughman P 24381

Subscribed and sworn to before me
this 3rd day of May, 1995

Joyce Nelson DeVoll
Notary Public, Wayne County, Michigan
My commission expires: 7-1-98